View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by St. John's University School of Law

St. John's Law Review

Volume 45
Number 2 *Volume 45, December 1970, Number 2*

Article 18

December 2012

CPLR 3130: Interrogatories Prohibited in Wrongful Death Action Based on Breach of Warranty

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1970) "CPLR 3130: Interrogatories Prohibited in Wrongful Death Action Based on Breach of Warranty," *St. John's Law Review*: Vol. 45 : No. 2 , Article 18.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol45/iss2/18

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

ARTICLE 31 — DISCLOSURE

CPLR 3101: Pretrial examination permitted in matrimonial action.

In *Hochberg v. Hochberg*,[71] the Supreme Court, Nassau County, rejected the deeply rooted, restrictive approach toward disclosure in matrimonial actions and granted plaintiff-wife's motion for leave to examine the defendant with respect to earnings and financial status. Ordinarily, such a motion would be denied on the grounds that the pretrial examination would be burdensome and that it would jeopardize the parties' chances for a reconciliation.[72] As a result, while other areas of article 31 were being accorded liberal interpretations,[73] disclosure in matrimonial actions was limited to those instances in which a party could prove "special circumstances."[74]

Undoubtedly, pretrial examination proceedings may still be troublesome. However, under the DRL,[75] the parties must attend extensive conciliation proceedings before a matrimonial action can be pursued. If conciliation attempts prove futile (and this is evidenced by the fact that the matrimonial action is progressing), then the policy ground for withholding the advantages of disclosure — the hope of reconciliation — is no longer plausible.[76] Thus, courts should follow the realistic approach of *Hochberg*, while retaining power to issue a protective order in appropriate circumstances.

CPLR 3130: Interrogatories prohibited in wrongful death action based on breach of warranty.

CPLR 3130 proscribes the use of written interrogatories in an action to recover "damages for any injury to property, or a personal injury, resulting from negligence, or wrongful death." In addition, the section prohibits the service of interrogatories if a bill of particulars has already been demanded. These limitations evidence the reluctance

---

71 63 Misc. 2d 77, 310 N.Y.S.2d 737 (Sup. Ct. Nassau County 1970).

72 *See, e.g.*, Campbell v. Campbell, 7 App. Div. 2d 1011, 184 N.Y.S.2d 479 (2d Dep't 1959); *see generally* CARMODY — FORKOSCH, NEW YORK PRACTICE 575-76 (8th ed. 1963).

It should be noted that it is public policy, rather than the CPLR, which restricts the use of disclosure devices in a matrimonial action. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 238 (3d ed. 1970). *Cf.* Nomako v. Ashton, 20 App. Div. 2d 331, 247 N.Y.S.2d 230 (1st Dep't 1964).

73 *See, e.g.*, Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

74 *See* Hunter v. Hunter, 10 App. Div. 2d 291, 198 N.Y.S.2d 1008 (1st Dep't 1960); Kennedy v. Kennedy, 40 Misc. 2d 672, 243 N.Y.S.2d 737 (Sup. Ct. Kings County 1963); *see also* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 238 (3d ed. 1970).

75 DRL § 215(e) *et seq.* (McKinney 1967).

76 *See* 7B MCKINNEY'S CPLR 3101, commentary 15 at 18-20 (1970); *cf.* Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

on the part of the legislature to include interrogatory practice in the CPLR.[77] Indeed, the original intendment[78] to elevate interrogatories to a position of importance similar to that under federal practice[79] has been largely thwarted, particularly in view of the negligence exclusion which automatically barred interrogatories from the majority of New York cases.[80]

In personal injury and property damage actions, a distinction has been drawn between strict negligence claims[81] and those based on breach of warranty: interrogatories have been allowed in the latter instance but not the former.[82] However, it has been held in *Rothholz v. Chrysler Corp.*[83] that the use of interrogatories in wrongful death actions is prohibited regardless of the underlying theory of liability.

The action in *Rothholz* was commenced to recover damages for personal injuries and wrongful death allegedly sustained as the result of defendant's negligence and breach of warranty. In response to a motion for a preclusion order on the ground that answers to certain interrogatories had not been served, the plaintiff contended that the interrogatories relating to the wrongful death action were improper and that a protective order should issue.[84] Recognizing the soundness of one authority's viewpoint that it is illogical to allow interrogatories in personal injury actions based on breach of warranty but not in a wrongful death action predicated upon the same theory of liability,[85] the court, nonetheless, felt constrained by the wording of CPLR 3130 from sanctioning such an approach. Thus, the interrogatories relating to breach of warranty in the wrongful death action were ordered stricken.

Analytically speaking, the court's construction is correct since the reference to the exclusion of interrogatories in personal injury actions "resulting from negligence" is not repeated in the following phrase

---

77 The interrogatory provisions were excluded by the 1962 legislature. They were reinserted in 1963, but with diminished scope. *See* 7B McKINNEY'S CPLR 3130, commentary 2 at 668 (1970).

78 *See* FIRST REP. 148.

79 FED. R. CIV. P. 33.

80 7B McKINNEY'S CPLR 3130, commentary 3 at 669 (1970).

81 Substance controls form so that the interrogatory is excluded whenever negligence is the crux of the claim. *See* Fiorentino v. Jaques, 41 Misc. 2d 972, 246 N.Y.S.2d 421 (Sup. Ct. Nassau County 1964).

82 *See* Ford Motor Co. v. O. W. Burke Co., 51 Misc. 2d 420, 273 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1966); *see also The Quarterly Survey*, 41 ST. JOHN'S L. REV. 642, 655 (1967).

83 62 Misc. 2d 901, 309 N.Y.S.2d 834 (Sup. Ct. Queens County 1970).

84 The plaintiff also contended that the interrogatories were improper since the defendant had previously served a demand for a bill of particulars. However, this objection was deemed to be without merit since defendant had withdrawn his demand. *Accord*, 3 WK&M ¶ 3130.03.

85 *See* 7B McKINNEY'S CPLR 3130, commentary 3 at 671 (1970).

dealing with wrongful death. But, as pointed out by Professor Siegel, this is not an area for literal interpretation.[86] It is incongruous not to adopt the "limited to negligence" language in wrongful death actions where the plaintiff is also suing for personal injuries; the claims can be joined and, if the death is traceable to the injury, liability "would rest on the same foundation that supports the liability for the personal injury."[87]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Summary judgment granted despite plaintiff's failure to allege freedom from contributory negligence.

In *DePaul v. George*,[88] plaintiff, a passenger in a car driven by defendant, moved for summary judgment on the ground that defendant was collaterally estopped from relitigating the issue of his negligence as a result of a prior judgment against him.[89] On appeal from an order granting summary judgment, defendant contended that plaintiff's freedom from contributory negligence had been neither alleged nor proved in the lower court. A majority of the First Department was, nonetheless, of the opinion that in a passenger versus driver situation, the driver should be aware of whether his passenger was contributorily negligent. Thus, the driver, on his own initiative, should come forward with any evidence regarding plaintiff's misconduct without requiring the plaintiff "to institute the first movement of a ritualistic dance"[90] by alleging freedom from contributory negligence.

Normally, of course, freedom from contributory negligence is an intricate part of plaintiff's cause of action which must be pleaded and proved.[91] However, appellate courts have generally adopted a permissive attitude toward granting summary judgment where, as in *DePaul*, a passenger is suing his host driver.[92] In this instance, plaintiff's conduct is rarely an actual issue in the case.[93] Thus, although good practice dictates an exculpatory affidavit by plaintiff, the failure to insert what is essentially a pro forma allegation should not prejudice his claim.

---

86 *Id.*

87 *Id.*

88 34 App. Div. 2d 620, 309 N.Y.S.2d 90 (1st Dep't 1970).

89 *Cf.* B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

90 34 App. Div. 2d at 620, 309 N.Y.S.2d at 92.

91 Weston v. City of Troy, 139 N.Y. 281, 34 N.E. 780 (1893).

92 *See, e.g.*, Gerard v. Inglese, 11 App. Div. 2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960); *see also* 4 WK&M ¶ 3212.03.

93 *See, e.g.*, Schembri v. Burke, 57 Misc. 2d 703, 293 N.Y.S.2d 487 (Sup. Ct. Queens County 1968); Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (Sup. Ct. Suffolk County 1968).